FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-838

STATE OF MAINE, *et. al.*,

Petitioners,

—v.—

JOLINE AND LIONEL THIBOUTOT, *et. al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
STATE OF MAINE

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF MAINE, *AMICI CURIAE*

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. THE COURT BELOW PROPERLY EXERCISED CONCURRENT JURISDICTION OVER THIS §1983 CAUSE OF ACTION.	6
II. 42 U.S.C. §1983 PROVIDES A REMEDY FOR THE DEPRIVATION OF STATUTORY AS WELL AS CONSTITUTIONAL RIGHTS	10
A. Congress Intended to Repeal All Prior Acts When It Enacted the 1874 Revision.	12
B. This Court Has Adopted Rules of Statutory Construction Consistent With Congress' Intent to Repeal All Prior Acts in Enacting the 1874 Revision	17
C. Courts and Congress Have Repeatedly Agreed That the Phrase "and laws" in §1983 Means Precisely What It Says	24
III. THE PROVISIONS OF THE CIVIL RIGHTS ATTORNEYS' FEES AWARDS ACT OF 1976 AUTHORIZED AN AWARD OF ATTORNEYS' FEES IN THIS CASE	36
CONCLUSION	44

TABLE OF AUTHORITIES

Cases	Pages
Adams v. Cuyler, 592 F.2d 720 (3d Cir. 1979) cert. granted 48 U.S.L.W. 3513 (Feb. 19, 1980)	33
Adickes v. Kress, 398 U.S. 144 (1970)	5, 28, 29, 30
Advertiser Company v. Wallace, 446 F.Supp. 677 (M.D. Ala. 1978)	8
Aguayo v. Richardson, 473 F.2d 1090 (2d Cir. 1973), cert. denied sub nom. Aguayo v. Weinberger, 414 U.S. 1146 (1974)	36
Alberty v. Daniel, 25 Ill. App. 3d 291, 323 N.E. 2d 110 (1974)	9
Aldinger v. Howard, 427 U.S. 1 (1976)	7
Anderson v. Graham, 492 F.2d 986 (8th Cir. 1973)	36
Armstrong v. Ross Twp., 82 Mich. App. 77, 266 N.W. 2d 674 (1978)	9
Arthur v. Dodge, 101 U.S. 34 (1880)	19
Backus v. Chilivis, 236 Ga. 500, 224 S.E. 2d 370 (1976)	9

Cases — Pages

Bartels v. Biernat, 405 F.Supp. 1012 (E.D.Wisc. 1975).....35

Bass v. Rockefeller, 331 F.Supp. 945 (S.D.N.Y. 1971) vacated as moot, 464 F.2d 1300 (2d Cir. 1971).....36

Bate Refrigerating Co. v. Sulzberger, 157 U.S. 1 (1895).....19

Blue v. Craig, 505 F.2d 830 (4th Cir. 1974).....31,36,43

Board of Trustees v. Holso, 584 P.2d 1009 (Wyo. 1978)..... 9,37

Bomar v. Keyes, 162 F.2d 136 (2d Cir. 1947) cert. denied, 332 U.S. 825 (1947).....34

Bond v. Stanton, 504 F.2d 1246 (7th Cir. 1974), cert. denied, 420 U.S. 984 (1975).....40,41

Bond v. Stanton, 528 F.2d 688 (7th Cir. 1976).....40

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Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1977)..... 6

Cases — Pages

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Brown v. Stanton, No. IP 78-773-C (7th Cir. Jan. 30, 1980, as amended Feb. 29, 1980)..... 36

Cambria Iron Co. v. Ashburn, 118 U.S. 54 (1886)..... 19

Chapman v. Houston Welfare Rights Organization U.S. , 60 L.Ed. 2d 508 (1979).....passim

Chase V. McMasters, 573 F.2d 1011 (8th Cir. 1978) cert. denied, 439 U.S. 965 (1978).....34

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Clark v. Bond Stores, Inc. 41 A.D. 2d 620, 340 N.Y.S. 2d 847 (1973)..... 9

Commonwealth ex. rel. Saunders v. Creamer, 464 Pa. 2, 345 A.2d 702 (1975)..... 9

Continental Casualty Company v. DuPont School District, 317 A.2d 101 (Del. 1974)..... 9

Continental Casualty Co. v. United States, 314 U.S. 527 (1942)..... 4, 20

Cases — Pages

D ffeback v. Hawke, 115 U.S. 392 (1885).....19

Dennis v. Chang, 611 F.2d 1302 (9th Cir. 1980).....36

Dwight v. Merritt, 140 U.S. 213 (1891).....19

Edelman v. Jordan, 415 U.S. 651 (1974).....26

Examining Board of Engineers v. Flores de Otero, 426 U.S. 572 (1976).....21

Ex Parte Collett 337 U.S. 55 (1949).....20

Fairbanks Correctional Center v. Williamson, 600 P.2d 743 (Alaska 1979)..... 8

FEA v. Algonquin Sng, Inc., 426 U.S. 548 (1976).....44

Giguere v. Affleck, 370 F.Supp. 154 (D.R.I. 1974).....35

Gomez v. Board of Education of Duke Ind. School District, No. 21, 85 N.Mex. 708, 516 P.2d 679 (1973)..... 9

Gomez v. Florida State Employment Service, 417 F.2d 569 (5th Cir. 1969).....34

Cases — Pages

Greenwood v. Peacock, 384 U.S. 808 (1966).....24

Grubb v. Public Utilities Commission of Ohio, 281 U.S. 470 (1930)..... 6

Hague v. CIO, 307 U.S. 496 (1939)....23,25

Hamilton v. Rathbone, 175 U.S. 414... 4,19, (1899).....23,24

Harradine v. Board of Supervisors, 48 U.S.L.W. 2601 (N.Y.Sup.Ct., App. Div. 4th Dept).....37

Hines v. Guthrey, 342 F.Supp. 594 (W.D.Va. 1972).....34

Holley v. Lavine, 605 F.2d 638 (2d Cir. 1979).....36

Houston v. Moore, 18 U.S. 1 (1820)..... 6

Hudson Distributors v. Eli Lilly & Co., 377 U.S. 386 (1964).....44

Hutto v. Finney, 437 U.S. 678 (1978).....38

Johnson v. Buie, 312 F.Supp. 1349 (W.D.Mo. 1970).....34

Jones v. Hildebrant, 432 U.S. 183 (1977) (per curiam)..... 7

Cases — Pages

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Kish v. Wright, 562 P.2d 625 (Utah 1978) 9

Lamb Enterprises, Inc. v. Kiroff, 399 F.Supp. 409 (N.D.Ohio 1975) reversed on other grounds, 549 F.2d 1052 (6th Cir. 1977), cert. denied, 431 U.S. 968 (1977) 35

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Long v. District of Columbia, 152 U.S.App. D.C. 187, 469 F.2d 927 (1972) 8

Louise B. v. Coluatti, 606 F.2d 392 (3d Cir. 1979) 36

Lynch v. Household Finance Corp. 405 U.S. 538 (1972) 25

McBride v. Soos, 594 F.2d 610 (7th Cir. 1979) 34

McDonald v. Hovey, 110 U.S. 619 (1884) 18,21

Martinez v. California, 48 U.S.L.W. 4076 (Jan. 15, 1980) 3,7

Cases — Pages

Mathes v. Nugent, 411 F.Supp. 968 (N.D.Ill. 1976) 35

Mitchum v. Foster, 407 U.S. 225 (1972) 25

Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978) 25

NBC, Inc. v. Engel, 397 A.2d 636 (N.H. 1979) 9

New Times, Inc. v. Arizona Board of Regents, 20 Ariz. App. 422, 513 P.2d 960 (1973) 8

Picking v. Pa. R. Co., 151 F.2d 240 (3d Cir. 1945), cert. denied 332 U.S. 776 (1947) 33

Pierson v. Grant, 357 F.Supp. 397 (N.D. Iowa 1973), aff'd on other grounds, 527 F.2d 161 (8th Cir. 1975) 34

Raffone v. Sullivan, 436 F.Supp. 939 (D.Conn. 1977), remanded, 595 F.2d 1209 (2d Cir. 1979) 34

Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949) 35

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RCA del Caribe, Inc. v. Silva Recio, 429 F.Supp. 651 (D.P.R. 1976).....35

Rosacker v. Multnomah County, 603 P.2d 1216 (Or.App. 1979)..... 9

Rosado v. Wyman, 397 U.S. 397 (1970).....passim

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Roselli v. Affleck, 373 F.Supp.36 (D.R.I. 1974) aff'd on other grounds, 508 F.2d 1277 (1st Cir. 1974).....36

Rzeznik v. Chief of Police of Southhampton, 373 N.E.2d 1128 (Mass. 1978)..... 9

Sanders v. Conine, 506 F.2d 530 (10th Cir. 1974).....33

Shapiro v. Columbia Un. Nat. Bk. & Tr. Co., 576 S.W. 2d 310 (Mo. 1978) (en banc) (per curiam)... 9

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Stefanelli v. Minard, 342 U.S. 117 (1951)..... 7

T & M Homes, Inc. v. Township of Mansfield, 162 N.J. Super. 497, 393 A.2d 613 (1978)..... 9

Terry v. Kolski, 78 Wisc. 2d 475, 254 N.W. 2d 704 (1977)..... 9

Testa v. Katt, 330 U.S. 386 (1947)... 8

Thompson v. Medical Licensing Board of Indiana, 398 N.E. 2d 679 (Ind. App. 1979)..... 9

Tobeluk v. Lind, 589 P.2d 873 (Alaska 1979).....37

Tongol v. Usery, 601 F.2d 1091 (9th Cir. 1979).....36

Train v. Colorado Pub. Int. Research Group, 426 U.S. 1, 11 (1976).....21

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Vason v. Carrano, 31 Conn. Sup. 338, 330 A.2d 99 (1974)..... 9

Vietor v. Arthur, 104 U.S. 498 (1881).....18

Warner v. Goltra, 293 U.S. 155 (1934).....22

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Wirth v. Surles, 562 F.2d 319 (4th Cir. 1977) cert. denied, 435 U.S. 933 (1978).....33,34

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28 U.S.C. 1331.....passim

28 U.S.C. 1343 (3).....passim

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42 U.S.C. 1988.....passim

Other Authorities — Pages

R.S. §728.....19

R.S. §1979.....17,21,33

R.S. §5596.....14

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2 Cong. Rec. 648 (1874)	14
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2 Cong. Rec. 1029 (1874)	14
2 Cong. Rec. 1209-1210 (1874)	13
2 Cong. Rec. 2713 (1874)	13
7 Cong. Rec. 1137 (1878)	15,16
67 Cong. Rec. 12074-5 (1926)	16
110 Cong. Rec. 9676 (1964)	29
122 Cong. Rec. 33313-14 (1976)	39
122 Cong. Rec. 33315 (1976)	32
122 Cong. Rec. 35122 (1976)	43
122 Cong. Rec. 35128 (1976)	39

In The

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STATE OF MAINE, et. al.,

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v.

JOLINE AND LIONEL THIBOUTOT, et. al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
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BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF MAINE, AMICI CURIAE

INTEREST OF AMICI CURIAE

The American Civil Liberties Union is a nationwide, non-partisan organization of over 200,000 members, dedicated to defending the rights secured by the Constitution and laws

of the United States. Together with its state affiliates, the ACLU has been particularly interested in creating effective remedies for rights abridged when state officials violate federal law. The ACLU's effort to preserve and protect 42 U.S.C. §1983 as a cornerstone of this effort has led to its participation, directly or as amicus curiae, in numerous §1983 cases in the Court over the past decades. It has also led the ACLU to work in Congress for passage of the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988, to enable citizens to afford the legal actions §1983 authorizes.

This case raises the question whether the effectiveness of §1983 and §1988 in securing adherence by state officials to Federal law will be maintained, or drastically weakened by a grudging, narrow reading contrary to the plain words of those statutes. We submit this brief amici curiae to urge the Court to protect individual rights by construing §1983 and §1988 in accordance with their plain, unambiguous, expansive language, and in light of the broad, remedial purposes for which they were enacted.*

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* Letters from all parties consenting to the filing of this brief have been lodged with the Clerk of the Court.

SUMMARY OF ARGUMENT

Since 28 U.S.C. §§1343 (3) and 1331 grant original but not exclusive federal jurisdiction over actions arising under 42 U.S.C. §1983, the court below properly exercised concurrent jurisdiction. Martinez v. California, 48 U.S.L.W. 4076 (Jan. 15, 1980); Grubb v. Public Utilities Commission of Ohio, 281 U.S. 470 (1930).

On its face, §1983 provides a cause of action for the deprivation, under color of law, of "rights, privileges, and immunities secured by the Constitution and laws." Since the Social Security Act is a law which provides rights to welfare recipients, the Thiboutots properly brought this §1983 action seeking to secure compliance with the provisions of the Social Security Act by Maine, a participating state. Rosado v. Wyman, 397 U.S. 397 (1970). Petitioners contend, however, that since the phrase "and laws" was added to §1983 at some point during the 1874 statutory revision process, §1983 should be read narrowly to refer only to laws which provide for equal rights.

That contention has been foreclosed for at least two reasons. First, Congress intended the 1874 Revision to act as a complete

repeal of prior statutes. The effect of such a complete repeal, as Congress well knew, was to preclude judicial examination of prior statutes in cases of conflict between original statutes and revised statutes. Second, the Supreme Court adopted rules of construction consistent with Congress' intent to effectuate an absolute repeal. The revised statute must therefore be given full effect, notwithstanding a discrepancy between it and the prior statute. Continental Casualty Co. v. United States, 314 U.S. 527, 530 (1942); Hamilton v. Rathbone, 175 U.S. 414 (1899); United States v. Bowen, 100 U.S. 508 (1880).

Even if this Court's long-standing rules of statutory construction did not prevent Maine from invoking a long-repealed act in order to throw doubt on §1983's proper interpretation, the consistent application by courts and Congress of the plain language of §1983 should lead this Court to give full effect to that language.

This Court has already decided that for a specific statute to serve as a basis for recovery under §1983, two conditions must be satisfied: (1) the law must secure some right, privilege, or immunity to the plaintiff; and

(2) Congress must not have provided an exclusive means of statutory enforcement. Adickes v. Kress, 398 U.S. 144 (1970); Rosado v. Wyman, supra.

Lower Federal Courts have applied this two-part test in numerous cases brought to protect federal statutory rights. Congress has implicitly approved the full scope of 42 U.S.C. §1983 by legislating on the basis of those cases. For example, in enacting the Civil Rights Attorney's Fees Awards Act of 1976, Congress made clear its awareness that §1983 protected the entire range of federal statutory rights as well as its intention that attorneys' fees should be awarded to those suing under §1983 to protect those statutory rights. Therefore, the findings of the Court below that this action was properly brought under §1983 and that this was a proper case for an award of attorneys' fees should be affirmed.

ARGUMENT

I. THE COURT BELOW PROPERLY EXERCISED CONCURRENT JURISDICTION OVER THIS §1983 CAUSE OF ACTION.

This Court has held that "state courts of general jurisdiction have the power to decide cases involving federal constitutional rights where...neither the Constitution nor statute withdraws such jurisdiction." Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 320 n.3 (1977). If a Congressional statute contains no express provision to the contrary, a grant of concurrent jurisdiction over the enforcement of federal statutes will be presumed. Grubb v. Public Utilities Commission of Ohio, 281 U.S. 470 (1930); Claffin v. Houseman, 93 U.S. 130, 136 (1876); Houston v. Moore, 18 U.S. 1, 25-26 (1820); Hart and Wechsler, Federal Courts and the Federal System, 418 (2d Ed. 1973). Since 28 U.S.C. §§1343 (3) and 1331 grant original but not exclusive jurisdiction to federal courts to hear actions arising under 42 U.S.C. §1983, state courts may properly exercise concurrent jurisdiction.[1/]

[1/] Section 1331 provides in pertinent part:

(footnote continued on next page)

This Court has already indicated that concurrent federal and state court jurisdiction to hear §1983 claims exists. Martinez v. California, 48 U.S.L.W. 4076, 4077 n.7, (Jan. 15, 1980); Aldinger v. Howard, 427 U.S. 1, 15, 18 (1976); Id. at 36 n.17 (Brennan, J., dissenting); Jones v. Hildebrant, 432 U.S. 183 (1977) (per curiam). Concurrent state court jurisdiction over §1983 claims is consistent with the philosophy of federalism embodied in the Constitution and expounded in Stefanelli v. Minard, 342 U.S. 117 (1951), and Younger v. Harris, 401 U.S. 37 (1971). A

(footnote continued from preceding page)

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States....

Section 1343 (3) confers jurisdiction on federal courts:

> To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States....

contrary result is not required by any concern over the unwillingness on the part of state courts to protect constitutional and statutory rights, because the Supremacy Clause requires state court judges to enforce federal law when applicable, Testa v. Katt, 330 U.S. 386, 391 (1947), and because federal forums will in any event remain available at the option of the plaintiff, as specifically contemplated by the 42nd Congress.

Every federal court that has been faced with the question of state court §1983 jurisdiction has assumed it exists. See, e.g., Spence v. Latting, 512 F.2d 93 (10th Cir. 1975), cert. denied, 423 U.S. 896 (1975); Long v. District of Columbia, 152 U.S. App. D.C. 187, 469 F.2d 927 (1972); Advertiser Company v. Wallace, 446 F.Supp. 677 (M.D. Ala. 1978) (Johnson, C.J.). State courts in at least 22 states have exercised jurisdiction over §1983 causes of action.[2/] The

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2/ Fairbanks Correctional Center v. Williamson, 600 P.2d 743 (Alaska 1979); New Times, Inc. v. Ariz. Board of Regents, 20 Ariz. App. 422, 513 P.2d 960 (1973); Brown v. Pitchess, 13 Cal. 3d 518, 531 P.2d 772, 119 Cal. Rptr. 204 (1975); Silverman v. Univ. of Colorado, 36 Col. App. 269, 541 P.2d 93 (1975);

(footnote continued on next page)

court below properly exercised concurrent jurisdiction over respondent's §1983 claim.

(footnote continued from preceding page)

Vason v. Carrano, 31 Conn. Sup. 338, 330 A.2d 99 (1974); Continental Casualty Company v. DuPont School District, 317 A.2d 101 (Del. 1974); Backus v. Chilivis, 236 Ga. 500, 224 S.E.2d 370 (1976); Alberty v. Daniel, 25 Ill. App. 3d 291, 323 N.E. 2d 110 (1974); Thompson v. Medical Licensing Board of Indiana, 398 N.E. 2d 679 (Ind. App. 1979); Rzeznik v. Chief of Police of Southhampton, 373 N.E. 2d 1128 (Mass. 1978); Armstrong v. Ross Twp., 82 Mich. App. 77, 266 N.W. 2d 674 (1978); Shapiro v. Columbia Un. Nat. Bk. and Tr. Co., 576 S.W. 2d 310 (Mo. 1978) (en banc) (per curiam); NBC, Inc. v. Engel, 397 A.2d 636 (N.H. 1979); T & M Homes, Inc. v. Township of Mansfield, 162 N.J. Super. 497, 393 A.2d 613 (1978); Gomez v. Board of Education of Duke Ind. School District No. 21, 85 N.Mex. 708, 516 P.2d 679 (1973); Clark v. Bond Stores, Inc., 41 A.D.2d 620, 340 N.Y.S. 2d 847 (1973); Williams v. Greene, 36 N.C. App. 80, 243 S.E. 2d 156 (1978); Rosacker v. Multnomah County, 603 P.2d 1216 (Or. App. 1979); Commonwealth ex. rel. Saunders v. Creamer, 464 Pa. 2, 345 A.2d 702 (1975); Kish v. Wright, 562 P.2d 625 (Utah 1978); Terry v. Kolski, 78 Wisc. 2d 475, 254 N.W. 2d 704 (1977); Board of Trustees v. Holso, 584 P.2d 1009 (Wyo. 1978).

II. 42 U.S.C. §1983 PROVIDES A REMEDY FOR THE DEPRIVATION OF STATUTORY AS WELL AS CONSTITUTIONAL RIGHTS.

42 U.S.C. §1983 provides a private cause of action for the deprivation, under color of state law, of "rights, privileges, and immunities secured by the Constitution and laws."[3/] The language could not be more plain. Yet petitioners, following three members of this Court concurring in Chapman v. Houston Welfare Rights Organization,

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3/ Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding or redress.

Plaintiffs invoke §1983 in order to secure state compliance with the Social Security Act, 42 U.S.C. §601, et. seq. This Court has held that the Social Security Act is a law which secures certain rights to welfare recipients. Rosado v. Wyman, 397 U.S. 397 (1970).

U.S. , , 60 L.Ed. 2d 508, 526 (1979) (Powell, J., concurring), contend that since the phrase "and laws" was added at some point during the 1874 statutory revision process, §1983 should be read narrowly to encompass only constitutional rights and rights secured by laws providing for equal rights. That contention should be rejected, however, for two reasons. First, Congress unequivocally intended in 1874 to repeal completely all prior statutes, including the predecessor of §1983. The effect of such a complete repeal, as Congress well knew, was to preclude judicial examination of prior statutes in cases of conflict between original statutes and revised statutes. Second, the federal courts honored Congress' intention by adopting the following rule of construction:

> Revised Statutes must be treated as the legislative declaration of the statute law on the subjects which they embrace, on the first day of December, 1873. When the meaning is plain, the courts cannot look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language....

United States v. Bowen, 100 U.S. 508, 513 (1880). This Court must respect Congress' intentions and its own firm precedents, and

accord the phrase "and laws" in §1983 the all-inclusive meaning it plainly conveys.

A. Congress Intended to Repeal All Prior Acts When It Enacted the 1874 Revision.

Pursuant to the Act of June 27, 1866, 14 Stat. 74, President Andrew Johnson appointed a commission to revise, simplify, consolidate, and arrange all existing Federal statutes, which then comprised some 17 hefty volumes. In order to condense those 17 volumes into one, the revisers were "authorized to make changes to some extent, of which liberty they availed themselves." 2 Cong.Rec. 646 (1874) (remarks of Rep. Poland). In executing their work, the revisers "very often translated into their own language the ideas and objects of statutes, so that the new form adopted might be said to be inspired by Congress in ideas, but not in words." 2 Cong. Rec. 825 (1874) (remarks of Rep. Lawrence) (emphasis in original). Upon receipt of the finished product, however, the House Committee on Revision of the Laws determined that the statutory changes made by the revisers were so extensive that it would be impossible to secure Congressional passage of the

revision in any reasonable period of time. 2 Cong.Rec. 646 (1874) (remarks of Rep. Poland). The Committee therefore appointed Thomas Jefferson Durant, an attorney, to examine the revision and "strike out such modifications of the existing law." Id. The revision was thereafter examined by the Committee on Revision of the Laws and by the House in a series of sparsely attended evening sessions.

It quickly became clear during the evening sessions that the Committee and Mr. Durant had not "succeeded in eliminating every change which was made...." 2 Cong.Rec. 820 (1874) (remarks of Rep. Poland). See also remarks of Rep. Eldredge, 2 Cong.Rec. 1209-1210 (1874) ("...there have been radical changes in the law."). The very real possibility that such changes would elude the corrective pens of Congress led one Congressman to propose that the Committee on Revision of the Laws...

> ultimately report to the House that in the re-enactment of the statutes by this bill there should be a provision to the effect that nothing contained in this re-enactment shall be construed or held in any way to change the law in existence at the commencement of this session... It seems to me that such a provision as that would be better than anything else to preserve the law as it now exists.

2 Cong. Rec. 648 (1874) (remarks of Rep. Willard).

That proposal was rejected, however, in favor of a complete repeal provision, §5596. 2 Cong. Rec. 2713 (1874).[4/]

Despite Congress' attempts to correct the revisers' modifications, at least 253 substantive errors were discovered in the years immediately following enactment of the revision. Dwan and Feidler, The Federal Statutes--Their History and Use, 22 Minn. L. Rev. 1008, 1014 (1938). As Dwan and Feidler note, "[t]hat experience with errors made Congress reluctant to enact revisions of statutes as law." Id. Indeed, when it authorized a new edition of the Revised Statutes in 1878 (which would revise only those laws enacted since

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4/ R. S. §5596 provides in part:

> All acts of Congress passed prior to said first day of December, 1873, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof.

See also remarks of Rep. Lawrence, 2 Cong. Rec. 1029 (1874) ("Where a statute is evidently designed as a revision of the whole subject, it repeals by implication all other statutes upon the same subject. That is a rule of law....").

1873), Congress was quite careful not to repeat its mistakes of four years earlier. In introducing a bill,[5/] later passed, to amend the Act already passed authorizing the 1878 edition of the Revised Statutes, Sen. Christiancy explained:

> The Revised Statutes, the present edition, on their adoption repealed all the laws which were re-enacted in them, and it was found that there were a great many errors in the revision adopted, which altered the law contrary to the intention of Congress in the passage of them. We have been constantly correcting those errors, but the courts cannot look back to the original and be governed by that, because the original act has been repealed and the revision has been made itself conclusive evidence. Now, to avoid any such result as that it has been thought best by the committees of both Houses that the [1878] revision should only be made evidence, but should not preclude the Court from looking back at the original act as passed; that is, in regard to acts which have been embodied in the edition since the other revision took effect, since December 1, 1873.

5/ The bill added the phrase "but shall not preclude reference to, nor control, in case of any discrepancy, the effect of any original act as passed by Congress since the first day of December, 1873." 7 Cong. Rec. 1137 (1878).

7 Cong. Rec. 1137 (1878) (emphasis supplied).6/

6/ When next Congress sought to revise the Federal statutes, in 1926, the House of Representatives proposed that the revision act as a complete repeal of previous statutes. The Senate, however, remembering the 1874 experience, insisted that the 1926 revision be considered only prima facie evidence of the existing statutory law. As Rep. Roy Fitzgerald, Chairman of the House Committee on Revision of the Laws, explained:

> Without this qualification or amendment it would have been impossible, apparently, for this bill to pass the Senate because the scope of this work is so large and the chance for error is so great that with all the safeguarding provisions... there was still felt apprehension of danger from error, even with the provision for postponement of its taking effect to July 1, 1927, which would permit a session of Congress for the correction of errors to intervene. The Senate felt that still the danger was too great to assume the responsibility of passing a bill of this magnitude and having it absolutely replace all the laws of the United States as was done by the Revised Statutes in 1874.

67 Cong. Rec. 12074 (1926) (emphasis supplied).

Fitzgerald further noted that "there is a clear distinction between the Revised Statutes in the seventies, and the bill as it passed the House, and this bill as it comes from the Senate. In the seventies they absolutely burned all bridges behind them..."

67 Cong. Rec. 12075 (1926).

Thus, the law applied by the Maine Supreme Court, and which this Court must apply, is not the Civil Rights Act of 1871, 17 Stat. 13, which has been repealed, but R.S. §1979, which plainly provides a remedy for the deprivation of federal statutory rights. The addition of the words "and laws" by Congress in 1874, on its face, represents an unambiguous decision to effectuate enforcement of all federal statutory rights in the face of state and local opposition to such enforcement. The unqualified words "and laws" must be afforded their plain, all-inclusive meaning.

B. This Court Has Adopted Rules of Statutory Construction Consistent With Congress' Intent to Repeal All Prior Acts in Enacting the 1874 Revision.

While Congress struggled to find and correct the reviser's modifications, the federal courts were flooded with challenges to the application of the revised statutes. In order to stem this tide, and in recognition of Congress' intent that the 1874 Revision act as a complete repeal, the courts quickly adopted a "plain-meaning" rule that severely

limited the use of prior acts in construing the revised provisions. In United States v. Bowen, this Court held that the

> Revised Statutes must be treated as the legislative declaration of the statute law on the subjects which they embrace, on the first day of December, 1873. When the meaning is plain, the courts cannot look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language....

100 U.S. 508, 513 (1880).

The Court reaffirmed Bowen the following year in Vietor v. Arthur, even though in that case "if there had been no revision, and we had been required to construe the statutes as they stood before Dec. 1, 1873, a different conclusion might have been reached." 104 U.S. 498, 500 (1881). In 1884 the Court once again had occasion to deal with changes wrought by the 1874 revision, and the Court held once again that "[o]f course, a change of phraseology which necessitates a change of construction will be deemed as intended to make a change in the law." McDonald v. Hovey, 110 U.S. 619, 629 (1884). The following year the Court used even stronger language:

> No reference, therefore, can be had to the original statutes to control the construction of any section of the Revised

> Statutes, when its meaning is plain, although in the original statutes it may have had a larger or more limited application than that given to it in the revision. United States v. Bowen, 100 U.S. 508, 513.

Deffeback v. Hawke, 115 U.S. 392, 402 (1885). See also Arthur v. Dodge, 101 U.S. 34 (1880); Cambria Iron Co. v. Ashburn, 118 U.S. 54, 57 (1886); Dwight v. Merritt, 140 U.S. 213, 217 (1891); Bate Refrigerating Co. v. Sulzberger, 157 U.S. 1, 33-34 (1895); Endlich, A Commentary on the Interpretation of Statutes, 65 (1888).

Perhaps the strongest statement of the "plain meaning" rule as applied to the 1874 Revision came in Hamilton v. Rathbone, 175 U.S. 414 (1899), where the Court dealt with an obvious conflict between the Act of April 10, 1869 and its revised counterpart, R.S. §728. Under the prior act, the power of a married woman residing in the District of Columbia to convey or bequeath her property did not extend to any property she had acquired from her husband. Under R.S. §728, however, a married woman could convey or bequeath all her property, however derived. This Court's holding in Rathbone, giving full effect to the Revised version, squarely controls the decision here:

> [W]here the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it. [citations omitted.] This rule has been repeatedly applied in the construction of the Revised Statutes...Indeed, the cases are so numerous in this Court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to solve, but not to create an ambiguity. If Section 728 were an original act, there would be no room for construction. It is only by calling in the aid of a prior act that it becomes possible to throw a doubt upon its proper interpretation.

Id. at 419-421 (emphasis in original).

The same rules of construction have been applied more recently. In Continental Casualty Co. v. United States, 314 U.S. 527, 530 (1942), this Court, although faced with a "change...in the Revised Statutes...made without any explanation of its purpose and indeed without the brackets or italics used to indicate a repeal or amendment...," held that "[t]he revised form, however, is to be accepted as correct, notwithstanding a possible discrepancy," citing Bowen. See also Ex Parte Collett, 337 U.S. 55, 61 n.12 (1949).

Only recently, in Examining Board of Engineers v. Flores de Otero, 426 U.S. 572 (1976), this Court implicitly reaffirmed the "plain-meaning" rule as applied to the 1874 Revision.[7/] The Court concluded that the unexplained addition by the revisers of the words "or Territory" to R.S. §1979 (the predecessor statute to §1983) would be given full effect as an expression of Congressional intent to enlarge the scope of the statute. The Court in Flores de Otero decided, in short, that a change of phraseology in the 1874 revision which necessitated a change of construction would be deemed as an intentional change of the law. Id. at 582. Accord, McDonald v. Hovey, 110 U.S. at 629.

United States v. Sischo, 262 U.S. 165 (1923), relied upon by Justice Powell in his Chapman concurrence, does not require a

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7/ Whatever the continuing validity of a "plain-meaning" rule in the ordinary course of statutory construction, see Train v. Colorado Pub. Int. Research Group, 426 U.S. 1, 11 (1976), the special rules of construction applicable to the 1874 Statutory Revision--rules mandated by Congress rather than invented by Courts--have never been questioned.

different result. Justice Holmes, writing for the Court in Sischo, held that "an insertion [of language] in the Revised Statutes... is not lightly to be read as making a change, although, of course, it may do so." Id. at 168-169. Sischo, however, involved the Act of June 22, 1874, which was slightly altered in the second edition of the Revised Statutes published in 1878. As we have shown above, Congress deliberately provided that different rules of statutory construction would apply to the 1878 revision than to the 1874 revision. The 1878 revision did not repeal all of the statutes then in force, as had the 1874 revision. Sischo, therefore, is simply inapposite. See also Warner v. Coltra, 293 U.S. 155, 161 n.4 (1934) (1926 revision).

If 42 U.S.C. §1983 were an original act, there would be no room for construction. The meaning of "and laws" is plain and unambiguous on its face; it provides a remedy for the deprivation, under color of state law, of federal statutory rights.[8/] It is only

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8/ That result would not, as petitioners claim, create an anomaly in that some §1983 claims could be brought in federal courts only under §1331, and not §1343 (3). It is

(footnote continued on next page)

by calling up the ghost of a long-repealed act that any doubt can be thrown on the proper interpretation of §1983. Petitioner's attempt to invoke that ghost, and thereby create an ambiguity that is not apparent on the face of §1983, must be therefore ignored. Hamilton v. Rathbone, supra.

(footnote continued from preceding page)

entirely logical to assume that Congress chose to limit the availability of §1343 to actions seeking to enforce equal rights laws while providing jurisdiction over other statutory §1983 actions only where the requisite amount in controversy under §1331 was involved. Such a choice presumably would have been based either on the theory that suits claiming infringements of equal rights guarantees are less amenable to pecuniary valuation than are other actions, see Hague v. CIO, 307 U.S. 496, 529 (1939) (opinion of Stone, J.), or on the theory that suits claiming such violations should be heard regardless of the amount in controversy.

C. Courts and Congress Have Repeatedly Agreed That the Phrase "and laws" in §1983 Means Precisely What It Says.

The Supreme Court has held that the main object of the 1874 revision

> was to incorporate all the existing statutes in a single volume, that a person desiring to know the written law upon any subject might learn it by an examination of that volume, without the necessity of referring to prior statutes upon the subject. If the language of the revision be plain upon its face, the person examining it ought to be able to rely upon it.

Hamilton v. Rathbone, 175 U.S. at 421.

This Court has frequently relied on the plain language of §1983 and its predecessor, R.S. §1979, by indicating that §1983 would provide a remedy for violation of a broad variety of federal "laws." In Greenwood v. Peacock, 384 U.S. 808, 829-830 (1966), the Court noted that:

> [O]ther sanctions, civil and criminal, are available in the federal courts against officers of a state who violate the petitioner's federal constitutional and statutory rights. Under 42 U.S.C. §1983 (1964 ed.) the officers may be made to respond in damages not only for violations of rights conferred by federal equal civil rights laws, but for violations of other federal constitutional and statutory rights as well.

Other cases indicating that §1983 protects federal statutory rights are Monell v. New York City Dept. of Social Services, 436 U.S. 658, 700-701 (1978);[9] Mitchum v. Foster, 407 U.S. 225, 239-240 n.30 (1972);[10] Lynch v. Household Finance Corp., 405 U.S. 538, 543 n.7 (1972);[11] and Hague v. CIO, 307 U.S. 496, 526-527 (1939) (opinion of Stone, J.).[12]

9/ "[T]here can be no doubt that §1 of the Civil Rights Act [of 1871] was intended to provide a remedy to be broadly construed against all forms of official violation of federally protected rights."

10/ "Although, as originally drafted in 1871, §1983's predecessor protected rights, privileges, or immunities secured by the Constitution, the provision included by Congress in the Revised Statutes of 1874 was enlarged to provide protection for rights, privileges, or immunities secured by federal law as well."

11/ "[T]he provision in the Revised Statutes was enlarged to provide protection for rights, privileges, or immunities secured by federal law as well [as those secured by the Constitution]."

12/ "The right of action given by [§1 of the Civil Rights Act of 1871] was later... extended to include rights, privileges and immunities secured by the laws of the United States as well as by the Constitution."

This Court also expressly relied on the plain meaning of the unambiguous phrase "and laws" in Rosado v. Wyman, 397 U.S. 397 (1970), which "held that suits in federal court under §1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating states." Edelman v. Jordan, 415 U.S. 651, 675 (1974). See also King v. Smith, 392 U.S. 309 (1968).

The contention that Rosado is not controlling here because the Court there merely made an "uncritical assumption" that §1983 protects statutory rights is without merit. A close examination of the Rosado litigation reveals that the Court was there faced with the precise questions presented here: (1) does §1983 provide a cause of action for the deprivation of statutory rights; (2) if so, does the Social Security Act "secure" any rights to plaintiffs within the meaning of §1983; and (3) if so, has Congress provided exclusive enforcement provisions within the Social Security Act which would bar §1983 jurisdiction? Judge Hays, author of the Second Circuit's opinion in Rosado, did not question the availability of §1983 to protect statutory rights but held that "the

complaint, properly read, does not allege the 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws' of the United States...Plaintiffs have no rights under federal law to any particular level of AFDC payments or, indeed, to any payments at all." 414 F.2d 170, 177 (2d Cir. 1969). Judge Feinberg explicitly agreed with Judge Hays' implicit ruling that §1983 provided a remedy for violation of federal statutory rights, although he dissented from the holding that no statutory right had been violated. Id. at 183-185 (Feinberg, J., dissenting). Only Judge Lumbard, concurring, denied the availability of §1983 to redress infringements of statutory rights. Id. at 181 (Lumbard, J., concurring). After full briefing and argument (see Brief for Respondents in Rosado at 3, 21, 26, 31-32), this Court reversed on the grounds "stated in the opinion of the District Court and Circuit Judge Feinberg's dissent...." 397 U.S. at 401. Justice Black's dissent, joined by the Chief Justice, did not dispute that §1983 encompasses statutory rights generally, but instead argued that Congress had entrusted

exclusive enforcement of the Social Security Act to the Department of Health, Education and Welfare. 397 U.S. at 433 (Black, J., dissenting). The majority opinion explicitly stated that "[w]e have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the state in view of the fact that Congress has lodged in the Department of Health, Education and Welfare the power to cut off federal funds for noncompliance with statutory requirements. We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." Id. at 420 (citations omitted). The sole "avenue of effective judicial review" relied upon or available in Rosado, as in King v. Smith, was §1983.

Two months after its Rosado decision this Court again reached the questions posed here. In Adickes v. Kress, 398 U.S. 144 (1970), the Court held that a violation of the Public Accommodations provisions of the 1964 Civil Rights Act would not "properly serve as a basis for recovery [of damages] under §1983."

Id. at 150 n.5. That holding was not based on any notion that §1983 did not cover statutory infringements; the "plain" terms of §1983 precluded such an argument. Id. at 150-51. Instead, the Court noted that Congress had intended the injunctive remedy of §206 of the Public Accommodations Title to be the "exclusive means of enforcing the rights based on this title." Id. The Adickes Court quoted Sen. Humphrey, floor manager of the Civil Rights Act, to the effect that the exclusive language of §206 "is necessary because otherwise it...would result...in civil liability for damages under 42 U.S.C. §1983." Ibid. quoting 110 Cong. Rec. 9676 (1964).

As the Adickes Court pointed out, Congress clearly recognized the availability of §1983 to redress statutory deprivations. In Senate hearings on the Public Accommodations provisons of the 1964 Civil Rights Act, Attorney General Robert Kennedy was asked about the existence of a §1983 cause of action in the case of an individual refused service in a restaurant because of his race. Hearings on Civil Rights and Public Accommodations Before the Senate Commerce Committee,

88th Cong., 1st Sess. 145 (1963). Kennedy, citing the Civil Rights Cases, 109 U.S. 3 (1883), responded that a court might hold that the individual had not been deprived of a constitutional right. Senator Hugh Scott, co-sponsor of the Civil Rights Act, then asked:

> "Mr. Attorney General, this, as I understand it, creates within the meaning of Section 1983 a statutory right, and it creates that statutory right absent a finding by the courts that these are constitutional rights."

Mr. Kennedy: "That is correct." Id. at 148-149 (emphasis added). See also Hearings on Civil Rights Before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 88th Cong., 1st Sess. 1410-1413 (1963) (remarks of Rep. Cramer, Committee Counsel Foley, and Attorney General Kennedy).

Congress, aware that §1983 would provide an alternative means to enforce the Public Accommodations Title, and apparently unwilling to allow such private actions, provided for exclusive jurisdiction. Adickes v. Kress. But there was no move to restrict §1983 to constitutional cases, much less any indication that §1983 reached only a limited

category of statutory rights. Had Congress intended to restrict §1983 generally to the protection of certain rights, rather than simply to remove the Title II right from the reach of §1983, it surely knew how to do so.

Congress was once again reminded of the sweep of §1983 during its debate over the Civil Rights Attorneys' Fees Awards Act of 1976. See infra Point III. Rep. Drinan, author of the House legislation on the subject, stated just prior to passage of the Act that "[u]nder applicable judicial decisions, Section 1983 authorizes suits against state and local officials based upon Federal statutory as well as constitutional rights. For example, Blue against Craig, 505 F.2d 830 (4th Cir. 1974)."[13] 122 Cong. Rec.

13/ Blue v. Craig was a challenge to North Carolina's policy of refusing to provide Medicaid recipients with reimbursement for transportation to and from Medicaid providers. The District Court dismissed the complaint on the ground that §1983 encompassed only constitutional claims. The Court of Appeals, after a lengthy discussion of prior case law and the 1874 Revision process, reversed: "We accordingly have no difficulty in resolving that this action, which seeks to invalidate a state-wide regulation alleged to deprive the plaintiffs of civil rights given them by the Social Security Act, even if regarded as being wholly statutorily-based, qualifies under §1983." 505 F.2d at 836.

35122 (1976). Similarly, in discussing the inconsistency of existing attorneys' fees statutes, the Senate report accompanying the Act stated that fees are allowed in a suit under Title II of the 1964 Civil Rights Act challenging discrimination in a private restaurant, but not in suits under 42 U.S.C. §1983 redressing violations of the Federal Constitution or laws by officials sworn to uphold the laws." S.Rep. No. 94-1011, 94th Cong., 2d Sess., reprinted in 5 U.S. Code Cong. & Administrative News 5908, 5911 (1976) (emphasis added). This passage was read to the House by Rep. Seiberling, a co-sponsor of the House legislation, just prior to adoption of the Senate bill by the House. 122 Cong. Rec. 35128 (1976). And just seconds before the bill passed in the Senate, Sen. Abourezk, floor manager of the bill, stated that "[t]his legislation is intended to cover cases based on both constitutional and statutory rights, including Supremacy Clause cases. 122 Cong. Rec. 33315 (1976).

Surely, if the interpretation of §1983 as encompassing all federal statutory rights represented "a dramatic expansion of federal

court jurisdiction," as the Chapman concurrence contended, then Congress, if it opposed such an "expansion," would have expressed that opposition in some fashion in 1964 and again in 1976 when the scope of §1983 was explicitly put before it.

Lower federal courts have also relied extensively on the unambiguous language of 42 U.S.C. §1983 and its predecessor, §1979. As early as 1945 the Third Circuit Court of Appeals refused to dismiss a R.S. §1979 complaint seeking damages for false arrest and detention in violation of the Uniform Extradition Act, Picking v. Pa. R. Co., 151 F.2d 240 (3d Cir. 1945), cert. denied, 332 U.S. 776 (1947). Since Picking, every Court of Appeals which has reached the question has held that "a complaint which charges abuse of the extradition power by noncomplaince with applicable law states a claim under 42 U.S.C. §1983." Sanders v. Conine, 506 F.2d 530, 532 (10th Cir. 1974).[14/]

14/ Accord, Adams v. Cuyler, 592 F.2d 720 (3rd Cir. 1979), cert. granted, 48 U.S.L.W. 3513 (Feb. 19, 1980); Wirth v. Surles, 562

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A number of other federal statutes have provided the basis for a §1983 cause of action. See, e.g., Chase v. McMasters, 573 F.2d 1011 (8th Cir. 1978), cert. denied, 439 U.S. 965 (1978) (Indian Reorganization Act of 1934); Gomez v. Florida St. Employment Service, 417 F.2d 569 (5th Cir. 1969) (Wagner-Peyser Act); Bomar v. Keyes, 162 F.2d 136 (2d Cir. 1947), cert. denied, 332 U.S.

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F.2d 319 (4th Cir. 1977), cert. denied, 435 U.S. 933 (1978); McBride v. Soos, 594 F.2d 610 (7th Cir. 1979); Pierson v. Grant, 357 F.Supp. 397 (N.D. Iowa 1973), aff'd on other grounds, 527 F.2d 161 (8th Cir. 1975). Cf. Raffone v. Sullivan, 436 F.Supp. 939 (D. Conn. 1977), remanded, 595 F.2d 1209 (2d Cir. 1979); United States ex. rel. Bryant v. Shapp, 423 F.Supp. 471 (D. Del. 1976); Hines v. Guthrey, 342 F.Supp. 594 (W.D. Va. 1972); Johnson v. Buie, 312 F.Supp. 1349 (W.D. Mo. 1970). Significantly, the courts in Raffone, Shapp, Hines, and Johnson did not find that §1983 was not available to redress infringements of federal statutes. Instead, those courts denied the §1983 claims because "the rights granted under the Federal provisions for extradition are granted to the states rather than to the fugitives...." Johnson, 312 F.Supp. at 1351.

825 (1947) (Judiciary Act);[15/] Mathes v. Nugent, 411 F.Supp. 968 (N.D. Ill. 1976) (Wagner-Peyser Act); RCA Del Caribe, Inc. v. Silva Recio, 429 F.Supp. 651 (D.P.R. 1976) (Title VII); Lamb Enterprises, Inc. v. Kiroff, 399 F.Supp. 409 (N.D. Ohio 1975), reversed on other grounds, 549 F.2d 1052 (6th Cir. 1977), cert. denied, 431 U.S. 968 (1977) (22 U.S.C. §1738); Bartels v. Biernat, 405 F.Supp. 1012 (E.D. Wisc. 1975) (Urban Mass Transportation Act; Rehabilitation Act of 1973); Giguere v. Affleck, 370 F.Supp. 154 (D.R.I. 1974) (Food Stamp Act); La Raza Unida of Southern Alameda County v. Volpe, 337 F.Supp. 221 (N.D. Cal. 1971), affirmed, 488 F.2d 559 (9th Cir. 1973), cert. denied, 417 U.S. 968 (1974).

The "and laws" provision of §1983 has been invoked, as here, most often in challenges aimed at securing state compliance with the requirements of the Social Security Act. Such challenges have been upheld both

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15/ In Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 533 (1949), this Court noted that Bomar "was a suit to enforce rights under a federal statute. Here, as in that case, there can be no doubt that the suit was properly commenced in the federal court."

before Chapman,[16] and after.[17]

III. THE PROVISIONS OF THE CIVIL RIGHTS ATTORNEYS' FEES AWARDS ACT OF 1976 AUTHORIZE AN AWARD OF ATTORNEYS' FEES IN THIS CASE.

The State of Maine's argument that 42 U.S.C. §1988 does not authorize an award of attorneys' fees in this case stands or falls chiefly on the success of its primary argument

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16/ See, e.g., Shea v. Vialpando, 416 U.S. 251 (1974); Rosado v. Wyman, 397 U.S. 397 (1970); King v. Smith, 392 U.S. 309 (1968); Aguayo v. Richardson, 473 F.2d 1090 (2d Cir. 1973), cert. denied sub. nom. Aguayo v. Weinberger, 414 U.S. 1146 (1974); Blue v. Craig, 505 F.2d 830 (4th Cir. 1974); Anderson v. Graham, 492 F.2d 986 (8th Cir. 1973); Bond v. Stanton, 504 F.2d 1246 (7th Cir. 1974), cert. denied, 420 U.S. 984 (1975); Roselli v. Affleck, 373 F.Supp. 36 (D.R.I. 1974), aff'd on other grounds, 508 F.2d 1277 (1st Cir. 1974); Bass v. Rockefeller, 331 F.Supp. 945 (S.D.N.Y. 1971), vacated as moot, 464 F.2d 1300 (2d Cir. 1971).

17/ See, e.g., Holley v. Lavine, 605 F.2d 638, 646 (2d Cir. 1979); Louise B. v. Coluatti, 606 F.2d 392 (3d Cir. 1979); Brown v. Stanton, No. IP 78-773-C (7th Cir. Jan. 30, 1980, as amended Feb. 29, 1980)(slip op.); Dennis v. Chang, 611 F.2d 1302 (9th Cir. 1980); Tongol v. Usery, 601 F.2d 1091 (9th Cir. 1979).

that §1983 does not apply to claims based on abridgement of federal statutory rights other than a narrow and undefined category of "civil rights." We have addressed and refuted that argument above. But its brief can also be read to suggest that even if the Thiboutots properly prevailed under §1983, the Civil Rights Attorneys' Fees Awards Act was not meant to authorize attorneys' fees in all 1983 actions, but only in actions for the enforcement of "civil" (e.g., non-Social Security Act) rights.[18] This argument is contrary to the unambiguous language of §1988 and contradicted by its legislative history.

The Civil Rights Attorneys' Fees Awards Act of 1976, Public Law 94-559, codified in 42 U.S.C. §1988, authorizes a court to award

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18/ Maine does not challenge the applicability of §1988 to state court proceedings. Every state court which has reached the question has accepted without hesitation the applicability of §1988. Young v. Toia, 66 A.D. 2d 377, 413 N.Y.S. 2d 530 (1979); Tobeluk v. Lind, 589 P.2d 873 (Alaska 1979); Ramirez v. County of Hudson, 169 N.J. Super. 455, 404 A.2d 1271 (Sup. Ct. Ch. Div. 1979); Board of Trustees v. Holso, 584 P.2d 1009 (Wyo. 1978), Harradine v. Board of Supervisors, 48 U.S.L.W. 2601 (N.Y. Sup. Ct., App. Div. 4th Dept., March 18, 1980).

reasonable attorneys' fees to the prevailing party "in any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, 1980, and 1981 of the Revised Statutes...."[19/] Thus, by its clear terms, the Act authorizes courts to award attorneys' fees in this case, which was brought under §1983. The constitutionality of §1988 was upheld by this Court in Hutto v. Finney, 437 U.S. 678 (1978). The legislative history in both the Senate and the House makes clear beyond doubt that §1988 authorizes an attorneys' fee award in this case.

The Senate Judiciary Committee Report which accompanied the Fees Act, in discussing the inconsistency of existing attorneys' fees statutes, stated that "fees are allowed in a suit under Title II of the 1964 Civil Rights Act challenging discrimination in a private restaurant, but not in suits under 42 U.S.C. §1983 redressing violations of the Federal Constitution or laws by officials sworn to uphold the laws." S.Rep. No. 94-1011, 94th Cong., 2d Sess., reprinted in 5 U.S. Code Cong. & Ad.

19/ R.S. §1979 is identical to 42 U.S.C. §1983. See generally Chapman v. Houston Welfare Rights Organization, 441 U.S. at 624.

News 5908, 5911 (1976)(emphasis added).[20/]

In the debate which preceded passage of the Fees Act in the Senate, Sen. Tunney, author of the fees legislation, explained the broad purpose of the statute:

> When Congress calls upon citizens--either explicitly or by construction of its statutes--to go to court to vindicate its policies and benefit the entire nation, Congress must also ensure that they have the means to go to court, and to be effective once they get there.

122 Cong. Rec. 33313 (1976).

Sen. Kennedy also spoke in broad terms of the need to provide protection for statutory rights:

> That Congress must act to provide means for citizens to enforce laws that are enacted for their protection can no longer be disputed. It has already included provisions for awards of attorneys' fees in over 50 statutes....

Sen. Kennedy, whom Maine here correctly described as a "primary supporter of the bill" (Pet. Br. at 21), proceeded to list "examples of conduct which this bill would help redress." Id. at 33314. Although Maine

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20/ Rep. Seiberling repeated the same statement just prior to House passage of the Senate bill. 122 Cong. Rec. 35128 (1976).

in its brief purports to reproduce that list of cases (Pet. Br. at 21-22), it omits, significantly, Bond v. Stanton, 504 F.2d 1246 (7th Cir. 1974), cert. denied, 420 U.S. 984 (1975), a §1983 statutory case which Kennedy characterized as one in which "officials accepted Social Security Act funds for years for certain medical screening programs when in fact they had no such programs in most of the State." Id.[21/] Sen. Kennedy also

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21/ Bond was a class action suit brought under 42 U.S.C. §1983 and 28 U.S.C. §1331 to enforce state compliance with the Social Security Act. No constitutional claim was asserted. The District Court held that, pursuant to 42 U.S.C. §1983 and Rosado, "this court has the power to review state welfare provisions and to prohibit the state use of any federal funds for non-compliance with statutory regulations and can enjoin the state from further use of federal funds." Bond v. Stanton, 372 F.Supp. 872, 875 (N.D. Ind. 1974). The Seventh Circuit, citing Rosado and King v. Smith, affirmed. 504 F.2d at 1251. The Seventh Circuit also upheld the District Court's bad faith award of attorneys' fees against defendants. Bond v. Stanton, 528 F.2d 688 (7th Cir. 1976). The Supreme Court vacated that judgment and remanded the case "for further consideration in light of" the Fees Act. 429 U.S. 973 (1977). On remand, the Seventh Circuit, holding that it is "clear that Congress

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included in his brief list of examples La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1973), another wholly statutory §1983 action.[22/]

(footnote continued from preceding page)

intended that the act extend to statutory claims asserted under §1983," and citing to Sen. Kennedy's remarks, affirmed the District Court's award of attorneys' fees pursuant to the Fees Act. Bond v. Stanton, 555 F.2d 172, 174 (7th Cir. 1977), cert. denied, 438 U.S. 916 (1978).

22/ The Court in La Raza found a violation of the provisions of the Relocation Assistance Act. As in Bond, the plaintiffs in La Raza were eventually awarded attorneys' fees pursuant to the Fees Act. La Raza Unida v. Volpe, 440 F.Supp. 904 (N.D. Cal. 1977). The La Raza case generated considerable Congressional interest. See Hearings on Legal Fees, Part III: Court Awards of Attorneys' Fees to the Prevailing Party in Litigation Before the Subcommittee on Representation of Citizen Interests of the Senate Committee on the Judiciary, 93rd Cong., 1st Sess. 787-800, 857-858, 1116-1119, 1326 (1973). Senator Tunney, Chairman of the Subcommittee and author of the Fees Act, opened those hearings by remarking that:

> Congress has enacted needed legislation affording citizens important rights in many areas. All too often, however, not enough attention has been given to the problem of enforcing these rights.

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Sen. Kennedy further commented that "...in each of these cases, the victim...had to go to court to enforce the rights promised by Congress or by the Constitution." Id. (Emphasis supplied). The inclusion by Kennedy of two §1983 claims involving rights secured by "laws" other than simply "equal rights" laws in his list of ten examples of cases covered by the Act belies Maine's contention that Congress intended §1988 to reach only constitutional, or other "traditional civil rights," claims.

Conclusive evidence that the Senate intended §1988 to apply to all claims cognizable under §1983 is provided by the final statements of the bill's floor manager in the Senate, Senator Abourezk, only moments prior to passage of the bill:

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> Without effective enforcement, rights are but a hollow declaration lacking any substantive effect.

Id. at 787. In partial answer to his own question, "Where are the attorneys to enforce these statutory rights?", Tunney introduced, as the first witness, the plaintiff's attorney in La Raza. Id.

> This legislation is intended to cover cases based on both constitutional and statutory rights, including Supremacy Clause cases. See 42 U.S.C. §1983.

122 Cong. Rec. 33315 (1976).

In introducing the Senate version of the Fees Act in the House, Rep. Drinan, a primary sponsor of the identical House legislation, set out "the scope of the covered statutes." 122 Cong. Rec. 35122 (1976). Section 1983, Drinan stated,

> protects civil and constitutional rights from abridgement by state and local officials...Under applicable judicial decisions, Section 1983 authorizes suits against State and local officials based upon Federal statutory as well as constitutional rights. For example, Blue against Craig, 505 F.2d 830 (4th Cir. 1974).[23]

The House passed the Senate bill shortly after Drinan completed his remarks. Id. at 35130.

The statements of sponsors of the Fees Act in both the House and the Senate just prior to passage of the Act that §1988 was intended to apply to suits brought under §1983 to redress infringements of Federal statutory rights, and specifically rights

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[23] Blue v. Craig was a §1983 action based on a state violation of the Social Security Act. See n.13, supra.

granted by the Social Security Act, should be "accorded substantial weight in interpreting the statute." FEA v. Algonquin Sng, Inc., 426 U.S. 548, 564 (1976). "Where the statutory language and the legislative history clearly indicate the purpose of Congress, that purpose must be upheld." Hudson Distributors v. Eli Lilly & Co., 377 U.S. 386, 395 (1964).

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Judicial Court of Maine should be affirmed.

Respectfully submitted,

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